

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

<p>JAMES ROBERT GREER,</p> <p style="padding-left: 40px;">Plaintiff and Respondent,</p> <p style="padding-left: 40px;">v.</p> <p>HOSSAM ALI BUZGHEIA,</p> <p style="padding-left: 40px;">Defendant and Appellant.</p>	<p style="text-align: right;">C049444</p> <p style="text-align: right;">(Super. Ct. No. 01AS06618)</p>
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Defendant Hossam Ali Buzgheia appeals from a judgment and order denying judgment notwithstanding the verdict (JNOV)¹ after a jury awarded plaintiff James Robert Greer, a total of \$321,500 in damages arising from an automobile accident.

Defendant seeks a new trial or a reduction in the judgment on the following grounds: (1) the trial court erred in denying defendant's motion in limine to exclude evidence of the amount of medical costs billed to plaintiff in excess of those actually paid; (2) the trial court should have granted a posttrial

¹ We dismiss defendant's purported appeal from the order denying his motion for a new trial. Such an order is nonappealable, but may be reviewed on appeal from the underlying judgment. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 2:143, p. 2-72.5.)

reduction of the damage award to reflect a compromise of plaintiff's medical bills; (3) the trial court committed prejudicial error in limiting the testimony of plaintiff's accident reconstruction expert; and (4) the court abused its discretion in permitting plaintiff to call an undesignated medical expert.

Finding no reversible error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was injured when defendant's pickup truck ran a red light and collided with plaintiff's pickup truck as plaintiff was making a U-turn on Folsom Boulevard in Sacramento. Soon after the accident, plaintiff complained of low back pain with radiation to his spine and hips. Plaintiff attempted to return to his job as a DSL² lineman for SBC Advanced Solutions, Inc. (SBC) but could not perform his duties without experiencing severe pain.

One year after the accident, plaintiff returned to work part time with the aid of pain injections, but this was unsuccessful, and his doctor declared him unable to return to work at his former occupation.

Two MRI scans, taken about 15 months apart, revealed that plaintiff had suffered a degenerative disk disruption or tear, with accompanying nerve damage. When the pain did not

² Digital subscriber line.

significantly subside, plaintiff underwent spinal fusion surgery whereby the damaged disk tissue at the L5-S1 spinal segment was removed and replaced with bone material.

Plaintiff filed a personal injury complaint against defendant. Plaintiff's employer, SBC, filed its own complaint to recover approximately \$30,000 in medical and disability benefits it paid on plaintiff's behalf. The two actions were consolidated by stipulation.

Shortly before the commencement of trial, SBC assigned all of its rights to plaintiff and filed notice that it would not be participating in the trial.

The most hotly disputed issue at trial was whether the severe back problems plaintiff experienced after the accident were attributable to it. Plaintiff presented expert medical testimony that, while he may have had some preexisting spinal degeneration, his current condition was directly related to the trauma he suffered as a result of the accident. Defendant's medical expert testified that plaintiff "may have had a low back strain related to the initial accident," which usually heals in a few months, but that there was no objective explanation for his symptoms and that he was not a surgical candidate. The defense also presented the testimony of Winthrop Smith, Ph.D., an expert in accident reconstruction and biomechanical analysis. Based on the data he analyzed, Dr. Smith calculated the impact speed of defendant's vehicle as approximately 10 miles per hour. He characterized the collision as one of "relatively low

severity," and likened the G-force associated with it to "hopping off a six-inch curb and landing on both feet," or "plopping into an office chair from a standing position."

Plaintiff presented evidence that his past economic loss, including lost wages, since the date of the accident totaled \$232,363. He also presented the testimony of a rehabilitation counselor, who reviewed medical bills totaling \$216,000 and testified that the amounts billed were reasonable for the services rendered.

The court submitted to the jury a special verdict form prepared by plaintiff's counsel and approved by counsel for defendant. The jury returned a verdict that found defendant 100 percent at fault for causing the accident. The damages portion of the special verdict, as completed by the jury, is reproduced below:

"Question No. 3:

"What are Plaintiff[']s damages?

"a. Past economic loss, including lost earnings/medical expenses:	<u>\$ 260,000</u>
"b. Future economic loss, including lost earnings/medical expenses:	<u>\$ 11,500</u>
"c. Past non-economic loss:	<u>\$ 50,000</u>
"d. Future non-economic loss:	<u>\$ -0-</u>
"TOTAL:	<u>\$ 321,500"</u>

Additional facts and procedural highlights will be set forth as they become relevant to the issues.

DISCUSSION

I. *Hanif/Nishihama* Reduction

A. *Procedural Background*

Prior to the commencement of trial, defendant brought a motion in limine to prevent the jury from receiving evidence of medical expenses that exceeded the amount paid on plaintiff's behalf to his medical providers. Defendant asserted, based on a letter from counsel for plaintiff's employer, SBC, that it had reached a compromise agreement with plaintiff's medical providers to satisfy his entire medical tab, which exceeded \$211,000 in exchange for the sum of \$132,984.92. Defendant argued that the jury should not be permitted to hear evidence that the reasonable value of the medical services exceeded the amount actually paid, since no one will be obligated to pay the difference. As authority for the motion, defendant cited *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 (*Hanif*) and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 (*Nishihama*), cases which hold that an injured plaintiff in a tort action cannot recover more than the amount of medical expenses actually paid or incurred, even if the market value of the services is a greater sum. (*Hanif*, at p. 641; *Nishihama*, at pp. 306-307.)

Here, the trial court denied the motion, with the proviso that if the amount of medical expenses awarded exceeded the amount paid, it would entertain a motion for reduction. The court said: "The cost of the medical damage is what it is. It is what the jury determines it to be. [¶] So if at the end of

this trial you can convince me that you're correct, then the Court would limit the recovery and have a hearing after trial, but neither *Nishihama* [n]or *Hanif* . . . require the Court to prevent the jury from hearing the evidence in the first instance."

The jury heard evidence of the amount of medical expenses billed by plaintiff's providers and testimony that the amounts were reasonable. The special verdict form, however, lumped medical expenses together with wage loss and other economic damage, by listing a single entry for "Past economic loss, including lost earnings/medical expenses."

After the verdict was entered and the jury discharged, defendant filed a motion for new trial or in the alternative motion for JNOV. Attached to the motion was an unsigned handwritten notation from SBC's counsel stating that "medical payments are \$132,984.92," along with 11 pages of computer printouts that purport to document payments made "to, or on behalf of SBC employee Greer."

At the posttrial hearing, the trial judge expressed puzzlement at defendant's choice of motions, noting that the court had not yet ruled on the *Hanif/Nishihama* issue and had expected to receive a motion for reduction of the verdict based on competent evidence of the amount of paid medical expenses. But "[y]our papers do not ask for a *Nishihama* hearing. Your papers in the form that they were submitted are asking for [a] new trial pursuant to a section that involves this Court setting

aside the jury verdict and allowing a new trial to begin before a new jury." To the extent the motion sought a new trial or JNOV, the court declared that it would be denied, since it found no legal error and the verdict was proper according to the evidence presented to the jury.

The trial judge stated that while she would entertain a motion for *Hanif/Nishihama* reduction in proper form, she wondered how such a motion would work in practice, since the special verdict form, which defense counsel had approved, did not list medical expenses as a separate line item.³

Defense counsel asserted that the jury verdict was "plenty big enough" to facilitate a *Hanif/Nishihama* offset, but the

³ The following excerpt from the transcript illustrates the point:

"[PLAINTIFF'S COUNSEL]: . . . [I] didn't hear any complaints from defense counsel about the verdict form.

"THE COURT: Nor did the Court.

"[PLAINTIFF'S COUNSEL]: [D]efense counsel had the duty, knowing they had a posttrial motion on *Nishihama* to do, to make sure and [differentiate] between the past medical and past income [loss] so that that hearing can go forward. Defense counsel failed to do that.

"THE COURT: . . . [T]he verdict form that was given to the jury says past economic los[s] including lost earnings slash medical expenses. So the \$260,000 is an amount that includes both

"[¶] . . . [¶]

"So the problem is, I don't know whether the \$260,000 is \$223,000 for lost wages and whatever the remainder is for medical, so I cannot make a determination from that jury verdict how much of that is medical and how much of that is lost income."

court replied that any reduction at this point would be purely speculative.

The court nevertheless gave defendant another opportunity to make a motion for a *Hanif/Nishihama* reduction, but asked for briefing on how to address the failure of the special verdict to itemize medical expenses.

Defendant came back with a written motion for a *Nishihama* offset, but by the time a hearing was held, the trial court noted that defendant's notice of appeal had been filed, divesting it of jurisdiction. Defense counsel replied that she "didn't participate fully in the appellate choices," and acknowledged she was not "resisting in a large way the jurisdictional argument," but indicated the purpose of the *Nishihama* motion was to "preserve[] the issue[] . . . for appeal."

B. Defendant's Contentions

1. Motion in limine.

Defendant contends the trial court initially erred in denying his motion in limine to exclude evidence of the full amount of plaintiff's billed medical expenses, since *Hanif* and *Nishihama* limit recovery to the amount actually paid.

Trial judges enjoy "'broad authority'" over the admission and exclusion of evidence. (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.) The motion in limine is not expressly authorized by statute, but is within the trial court's "'inherent power to entertain and grant.'

[Citation.] 'The scope of such motion is any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial.'

[Citation.] Its purpose is to avoid the unfairness caused by the presentation of prejudicial or objectionable evidence to the jury, and the 'obviously futile attempt to "unring the bell."'

(*Ibid.*)

In *Hanif*, the trial judge in a bench trial awarded the plaintiff the "reasonable value" of medical services rendered, despite the fact that the hospital that billed for the expenses accepted a reduced amount from plaintiff's Medi-Cal insurance. (*Hanif, supra*, 200 Cal.App.3d at p. 639.) Based on "[f]undamental principles underlying recovery of compensatory damages in tort actions" (*id.* at p. 640), the court held that a damage award for past medical expenses in an amount greater than its actual cost "constitutes overcompensation" (*id.* at p. 641). The court directed a reduction of the award, declaring that the maximum amount a plaintiff can recover for medical services is the amount "expended or incurred for past medical services," even if that amount "may have been less than the prevailing market rate" (*id.* at p. 641; see also *id.* at pp. 643-644).

In *Nishihama*, the jury received evidence of the "normal rates" charged by the hospital for care the plaintiff received. The plaintiff participated in a Blue Cross health plan, and Blue Cross paid the hospital at a discounted rate. The jury, unaware of the collateral source payment, awarded the plaintiff medical

costs based on the "normal" rates. (*Nishihama, supra*, 93 Cal.App.4th at pp. 306-307.) Following *Hanif*, the court held that it was error for the jury to award a sum for medical expenses greater than the actual amount paid to the hospital, and ordered the judgment modified. (*Ibid.*) However, the court held, the error did not require remand based on the fact that the jury *heard evidence* of the prevailing rate. To the contrary, the court noted, such evidence in all likelihood gave the jury a more accurate picture of the extent of the plaintiff's injuries. (*Id.* at p. 309.)

Here, in denying the motion in limine, the trial court informed defense counsel that, while a postverdict reduction of the jury's award of medical expenses might be justified, defendant could not prevent the jury from hearing evidence regarding reasonable medical costs for plaintiff's care in the first instance. The court made it clear that if the jury rendered an award that was excessive under *Hanif/Nishihama*, it would consider a posttrial motion to reduce the recovery.

The court's ruling was correct. *Nishihama* and *Hanif* stand for the principle that it is error for the plaintiff to *recover* medical expenses in excess of the amount paid or incurred. Neither case, however, holds that *evidence* of the reasonable cost of medical care may not be admitted. Indeed, *Nishihama* suggests just the opposite: Such evidence gives the jury a more complete picture of the extent of a plaintiff's injuries. Thus, the trial court did not abuse its discretion in allowing

evidence of the reasonable cost of plaintiff's care while reserving the propriety of a *Hanif/Nishihama* reduction until after the verdict. Defendant's claim of error in connection with the motion in limine is without merit.

2. Postverdict *Hanif/Nishihama* issues.

Defendant next claims the trial court erred in not ordering a *Hanif/Nishihama* reduction after the verdict was returned. His argument explores several variations on this theme, including (1) the trial court should have reassembled the jury and directed it to render a separate verdict for medical expenses; (2) the court should have reduced the judgment by the \$78,000 difference between the amount of expenses billed and those paid by plaintiff's employer, SBC; (3) the trial court should have granted a new trial due to the failure of the verdict to apportion damages; and (4) the court erred by failing to grant a new trial on grounds that the verdict was excessive.

We need not address these claims individually, for we find they have all been forfeited⁴ by defendant's failure to request a verdict form containing a separate entry for plaintiff's past medical expenses.

To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a

⁴ While the parties and case law refer to a "waiver" of the issue on appeal, "the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture,' because a person who fails to preserve a claim forfeits that claim." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

special verdict form that segregates the elements of damages. (*Brokaw v. Black-Foxe Military Institute* (1951) 37 Cal.2d 274, 280; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346; *English v. Lin* (1994) 26 Cal.App.4th 1358, 1369; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 746-747.) The reason for this rule is simple. Without a special verdict separating the various damage components, "we have no way of determining what portion--if any" of an award was attributable to a particular category of damages challenged on appeal. (*Heiner*, at p. 346.)

In this case, the jury received evidence that plaintiff suffered \$232,363 in lost wages and \$216,000 in medical expenses. The verdict form given to the jury contained a single entry under Question No. 3(a) for "Past economic loss, *including* lost earnings/*medical expenses*." (Italics added.) The jury completed this entry by awarding \$260,000, an amount that was easily justified by the evidence.

Hence, the trial court got it right when it observed that it was, for all practical purposes, impossible to calculate a *Hanif/Nishihama* reduction, since the jury award failed to distinguish what fraction of the \$260,000 economic damage award consisted of medical expenses and what portion was attributable to other items such as wage loss. Because the verdict form combined both components into one figure, the court could not apply a *Hanif*-type reduction of the verdict without engaging in obvious speculation. By failing to request a verdict form that

differentiated plaintiff's medical expenses from other items of economic damage, defendant forfeited the right to assert *Hanif/Nishihama* error on appeal.

Anticipating this result, defendant refers us to cases which hold that defects in the verdict are not waived by failure to object to the verdict form, unless such failure results from a deliberate strategic decision on the part of counsel. None of those cases applies here, however, because each of them involved ambiguity or inconsistency *in the verdict itself*. (See *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457; *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220; *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 756-757.)

By contrast, the verdict here did not suffer from any legal defect--it simply was not *specific enough* to render it amenable to the type of challenge defendant now raises. There was nothing wrong with the verdict form proposed by plaintiff. Indeed, as counsel for defendant pointed out, it was taken directly from the model verdict forms contained in the Judicial Council of California Civil Jury Instructions (2003-2004) (CACI). (See CACI No. VF-401.) In her posttrial declaration, defendant's counsel admitted that she approved the verdict form, but claimed that her mind was not focused on potential *Nishihama* issues despite the trial court's conditional denial of her pretrial *Hanif/Nishihama* motion. The trial court's pretrial flexibility is mirrored in the use note to the CACI No. VF-401,

which states, "The special verdict forms in this section are intended only as models. *They may need to be modified depending on the facts of the case.*" (Italics added.) Defendant's counsel has no one to blame but herself for a verdict form that was too general to preserve a reduction claim. We state the obvious in declaring that neither the trial court nor plaintiff had a duty to propose modifications of the verdict form so as to ensure defendant's *Hanif/Nishihama* rights were preserved.

We conclude that none of defendant's challenges to the judgment based on *Hanif/Nishihama* is cognizable on appeal.

II. Limitation on Dr. Smith's Testimony

Dr. Winthrop Smith was defendant's designated expert witness on accident reconstruction and was allowed to give his opinion that plaintiff suffered, at most, a slight sprain or strain from the collision. Prior to Dr. Smith's testimony, the trial court held an Evidence Code section 402 hearing on whether he could base his opinion, in part, on crash impact studies in a published article he had read. In the studies, human volunteers of varying ages, genders and weights were subjected to minor rear-end collisions. According to the articles, none of the test subjects suffered disk injuries or even back sprains.

After questioning Dr. Smith and reading the subject articles the trial court, exercising its discretion under Evidence Code section 352, refused to allow him to rely on the articles for his opinion. The court found that bringing the studies before the jury would be unduly prejudicial and

potentially confusing. The court noted that none of the vehicles used in the studies involved the make and model or year of the vehicle driven by plaintiff; that the volunteers were both male and female and of widely different ages, ranging from 20 to 60, and it was not revealed how many persons in each age group were tested; and that there was no indication that the volunteers were of similar age, background or physical condition as plaintiff.

Defendant contends this ruling constituted an abuse of discretion. He asserts that Dr. Smith was undisputedly qualified as an expert in biomechanics and that "any criticism with regard to studies or tests upon which he based his opinions affected only the weight of his testimony, not its admissibility."

Initially, we note that this claim is nonreviewable because the record does not contain the crash test studies or publications upon which Dr. Smith proposed to rely. The trial court's ruling was based in substantial part upon a review of these publications and their applicability to the facts of this case. The burden is on the appellant to provide the appellate court with a record sufficient to enable review of the arguments raised. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; see *id.* at pp. 148-149 (conc. opn. of Werdegar, J.); *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) Since the publications are not in the record, it is impossible for us to adequately review the correctness of the ruling.

To the extent we are able to review defendant's argument from the limited record, we find it without merit. Evidence Code section 352 permits the court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "The exclusion of evidence on the authority of Evidence Code section 352 by definition is a *discretionary* call on the part of the trial judge. The exercise of such discretion should be reversible on appeal only when it is manifestly abused." (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1000-1001, citing *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal.App.3d 1507, 1523.) An abuse of discretion is established only where the ruling exceeded the bounds of reason and results in a miscarriage of justice. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

"An expert opinion may be based on inadmissible matter provided that the matter provides a reasonable basis for the opinion. [Citations.] Evidence Code section 801 states, 'If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . . [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that *is of a type that*

reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.'" (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563 (*Lockheed*), italics added.) "We construe this to mean that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." (*Id.* at p. 564.)

In *Lockheed*, the issue was whether plaintiffs suffered adverse long-term health effects from exposure to five particular chemicals. (*Lockheed, supra*, 115 Cal.App.4th at pp. 561, 564-565.) The trial court refused to allow their expert to base a causation opinion on an epidemiological study that reviewed studies of exposure to more than 130 different chemicals and other substances. (*Id.* at pp. 562, 564.) The appellate court rejected the plaintiffs' contention that the trial court had usurped the role of the jury as fact finder, concluding that the multiple chemicals study could not adequately support a scientific conclusion that one particular chemical compound or substance caused a greater incidence of cancer. (*Id.* at pp. 564-565.)

Here, Dr. Smith proposed to base his opinion that the accident did not cause plaintiff serious injury on case studies involving unspecified low speed, rear-end collisions that did not use vehicles of the type driven in the accident and involved

a range of persons of vastly different ages, sizes and physical backgrounds than that of plaintiff. Absent a foundational showing that the tests were conducted upon persons and under circumstances substantially similar to those involved in plaintiff's accident, an expert opinion based on statistical studies of this nature was virtually worthless. Allowing Dr. Smith to rely on case studies involving a host of dissimilar factors would also have presented a danger of confusing the jurors by forcing them to deal with collateral and irrelevant issues. The trial court's ruling was well within the range of its discretion under Evidence Code section 352.

In any event, any error in excluding the studies was decidedly nonprejudicial. After all, Dr. Smith *was permitted* to give his opinion that plaintiff did not suffer significant injury; he was simply limited to using standard accident reconstruction analysis as its basis. Far more important from the defendant's standpoint was the testimony of his expert, Dr. Thomas Mampalam, who had examined plaintiff and opined that he sustained, at most, a low back strain that should have healed within a few months. Defendant has not demonstrated a reasonable probability that Dr. Smith's inability to refer to the crash studies had any material effect on the jury's verdict.

III. Dr. Shelub's Testimony

While it was a party to this action, SBC designated Dr. Mark Shelub as an expert witness pursuant to the disclosures required by former section 2034, subdivision (h) of the Code of

Civil Procedure⁵ (now section 2034.280) and stated that he would testify on issues relevant to SBC's reimbursement claim. The disclosure statement went on to state that the doctor would testify "as to the nature, costs, cause, and extent of Plaintiff's injuries, damages and treatment, made necessary as a result of this accident."

Just prior to trial, SBC filed a formal notice that it was assigning to plaintiff all of its rights to recover the sums prayed for in its complaint.

Prior to the start of trial, defendant objected to plaintiff calling Dr. Shelub as an expert witness on the ground that *plaintiff* had not included the doctor in his expert disclosure list. Defendant claimed that SBC's assignment of its rights to plaintiff was not a sufficient reason for plaintiff's failure to include Dr. Shelub on his own witness list. However, when the court offered to postpone the trial so that defendant could depose Dr. Shelub, defendant's counsel declined, stating, "I don't believe we would need to take his deposition. I feel adequately informed."

The court denied defendant's in limine motion to prevent Dr. Shelub from testifying. At least three grounds are discernible from the court's comments: (1) plaintiff stepped into the shoes of SBC through the assignment, and thereby

⁵ Undesignated statutory references are to the Code of Civil Procedure.

acquired the right to prosecute SBC's claim in the same manner as did SBC; (2) the purpose of the disclosure statute had been satisfied, since defendant was on notice at all times that Dr. Shelub might be called and had every opportunity to depose him; and (3) plaintiff's failure to list Dr. Shelub was not unreasonable under the circumstances and defendant had failed to show how he would be prejudiced by allowing Dr. Shelub to testify.

Defendant contends that the trial court erred in refusing to prevent Dr. Shelub from testifying on the ground that he was not included on plaintiff's witness list.

Former section 2034, subdivision (j) (now section 2034.300), upon which defendant relies, provided in pertinent part that "the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has *unreasonably* failed to do any of the following: [¶] (1) List that witness as an expert under [former] subdivision (f) [now section 2034.260]." (Italics added.) As a leading treatise on discovery procedure notes, "the exclusion sanction does not apply unless the court finds the failure to comply was 'unreasonable' ([§] 2034.300 [formerly § 2034, subd. (j)]). So, the court has considerable discretion to start off with!" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 8:1731, pp. 8J-38 to 8J-39.)

The court's finding here that the failure to disclose was not unreasonable was well within the realm of its broad

discretion. Defendant knew well before trial that Dr. Shelub might be called as a witness and was made aware of the substance of his testimony, since this information was disclosed on SBC's expert witness list. SBC withdrew from the case before trial and assigned its rights to plaintiff. That panoply of rights included the right to present all relevant evidence relating to SBC's claim for damages, which included Dr. Shelub's expert testimony. Finally, defendant's counsel declined the trial court's offer to depose Dr. Shelub before trial, stating that she felt "adequately informed." Hence, the purpose of the expert disclosure statutes, which is to prevent surprise and permit adequate discovery, was fully satisfied.

Defendant's reliance on *Gallo v. Peninsula Hospital* (1985) 164 Cal.App.3d 899 is unavailing. In *Gallo*, two defendants entered into a secret agreement that each would use an expert witness but only one would designate the witness on his disclosure list. (*Id.* at p. 902.) The nondesignating defendant (the hospital) filed a disclosure statement that merely reserved the right to call "'any experts identified by all parties and not called by the parties.'" (*Ibid.*) The doctor defendant who designated the expert was dismissed before trial and the hospital defendant was permitted, over the plaintiffs' objection, to call the expert, whose deposition had not been taken. The *Gallo* court held that a general reservation of rights was not, by itself, sufficient compliance with the expert disclosure statutes. (*Id.* at pp. 902-904.) The court said: "A

general 'reservation of rights' to call the other party's witnesses is not the type of disclosure envisioned by the statute. It does not apprise the opposing party of the identity of the specific expert to be relied upon. Nor does it reveal the 'general substance' of that testimony or its relation to the legal theory of that particular defendant." (*Id.* at pp. 903-904.) The court expressed concern that if a defendant could call expert witnesses by the simple device of a general reservation, he might be able to present expert testimony involving "an undisclosed legal theory," which his opponent would not be prepared to counter, a procedure that "could create a trap for the unwary." (*Id.* at p. 904.) The trial court's only mistake was in failing to hold a hearing to determine whether the defendant's failure to list the expert was excusable, and even then, the appellate court did not find the error prejudicial. (*Id.* at pp. 904-905.)

The trial court's ruling here did not run afoul of *Gallo's* limited holding. Plaintiff was not asserting the right to call Dr. Shelub based on a general reservation of rights, but by virtue of his status as successor in interest to SBC, which undisputedly filed a proper expert disclosure. The nature and substance of the doctor's proposed testimony was disclosed before trial, and defendant had every opportunity to depose him on those subjects. Contrary to defendant's suggestion, plaintiff's failure to list Dr. Shelub was not a product of "gamesmanship" or an attempt to hide the ball. Plaintiff was

presenting the same expert testimony that SBC would have put on had it not assigned its rights to plaintiff.⁶

No error occurred in permitting Dr. Shelub to testify.

DISPOSITION

The judgment and the order denying the motion for JNOV are each affirmed. Plaintiff shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a).)

_____, BUTZ, J.

We concur:

_____, DAVIS, Acting P. J.

_____, NICHOLSON, J.

⁶ As defendant fails to note in his brief, Dr. Shelub's deposition *was noticed and convened* before trial, but could not be reported because the court reporter did not appear. With the consent of the parties, defense counsel was nevertheless permitted to ask Dr. Shelub questions in an informal setting. Apparently satisfied with the fruits of her efforts, defense counsel never re-noticed the doctor's deposition.

Former section 2034, subdivision (m)(1) [now section 2034.310], permitted a party to call any expert designated by another party as long as that expert "has thereafter been deposed." Since Dr. Shelub had appeared for his deposition, plaintiff arguably had the right to call him pursuant to this section. (See *Powell v. Superior Court* (1989) 211 Cal.App.3d 441, 444-445.) At the least, a court could find that defense counsel's conduct estopped her from claiming otherwise.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JAMES ROBERT GREER,

Plaintiff and Respondent,

v.

HOSSAM ALI BUZGHEIA,

Defendant and Appellant.

C049444

(Super. Ct. No. 01AS06618)

ORDER OF PUBLICATION

APPEAL from a judgment of the Superior Court of Sacramento County, Patricia C. Esgro, Judge. Affirmed.

Shea Stokes & Carter, Shirley A. Gauvin, Julissa Robles; Trimble, Sherinian & Varanini and Suzanne M. Trimble for Defendant and Appellant.

Dreyer, Babich, Buccola & Callahan, Roger A. Dreyer, Christopher W. Wood, and Stephen F. Davids for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Parts II and III of the Discussion.

The opinion in the above-entitled matter filed on July 5, 2006, was not certified for publication in the Official Reports.

For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

DAVIS, Acting P.J.

NICHOLSON, J.

BUTZ, J.